

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BARBARA WARRIOR
Claimant

VS.

PROVIDENCE MEDICAL CENTER
Self-Insured Respondent

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Docket No. 1,013,561

ORDER

Claimant requested review of the November 18, 2004 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on May 17, 2005.

APPEARANCES

Timothy M. Alvarez, of Kansas City, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 3 percent permanent whole body impairment for her low back injury. The ALJ also concluded that claimant's left knee complaints were not related to her work accident. Therefore, he found respondent was not liable for additional permanency associated with that condition nor any authorized or unauthorized medical expenses regarding claimant's knee. The claimant requests review of this determination.

Claimant alleges the ALJ erred in excluding any recovery for her left knee complaints. She maintains she not only injured her back in her September 23, 2003 accident, but her left knee as well. As such, she is entitled to payment of the medical bills

incurred as a result of her left knee treatment and future medical benefits for that condition.

Respondent argues the claimant's appeal is not timely according to K.S.A. 44-551(b)(1), and that the Board has no jurisdiction to hear this appeal. Alternatively, assuming there is jurisdiction to hear this matter, respondent contends the ALJ's Award should be affirmed as claimant's left knee complaints came weeks after the September 23, 2003 event, and are not causally related to her accident.

The issues to be addressed are as follows:

1. Was claimant's appeal timely filed? And if so,
2. The nature and extent of claimant's impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes that claimant's request for review was not timely filed and the Board has no jurisdiction to hear this matter.

The right to appeal is entirely statutory and not a right vested in the Kansas Constitution.¹ An appellate court will have jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner prescribed in the applicable statutes.²

K.S.A. 44-551 provides for an appeal of "[a]ll final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge . . . upon written request of any interested party within 10 days." That statute goes on to state that "[i]ntermediate Saturdays, Sundays and *legal holidays* shall be excluded in the time computation."³

Distilled to its essence, this issue centers around the question of how to compute the 10 day appeal time when the period encompasses the Friday after Thanksgiving, November 26, 2004. If that day is counted, then claimant's appeal was not filed within the statutorily prescribed 10 day period. Conversely, if that day is excluded, then claimant's appeal is timely.

¹ *Little Balkans Foundation, Inc. v. Kansas Racing Comm'n.*, 247 Kan. 180, 188, 795 P.2d 368 (1990)

² *Id.*; See also *Tobin Constr., Co. v. Kemp*, 239 Kan. 430, 437, 721 P.2d 278 (1986).

³ K.S.A. 44-551.

The effective date of an administrative law judge's award, for review purposes, shall be the day following the date noted within the document.⁴ That same regulation goes on to provide that an application for review may be filed by facsimile directed to the division of workers compensation,⁵ and such applications will be considered as timely filed only if received in the central office or one of the district offices if filed "on or before the tenth day after the effective date" of the award.⁶

The pertinent dates to consider are as follows:

Thursday, November 18, 2004 ALJ filed Award

Friday, November 19, 2004 Effective date of Award

Tuesday, December 7, 2004 Application for Review filed with the Board

Utilizing the statutes and regulations set forth above, the ALJ's Award became effective November 19, 2004 and the time calculation begins on Monday, November 22, 2004 because the intervening Saturday and Sunday are excluded.

There is no dispute between the parties that Thursday, November 25, 2004 is, by statute, considered a legal holiday and is not to be included within the time computation.⁷ Friday, November 26, 2004 is not a legal holiday. It is, however, an *observed* holiday by virtue of K.A.R. 1-9-2 which permits the Governor to designate "additional days on which state offices are to be closed in observance of a holiday or a holiday season." In this instance, there is no dispute that Friday, November 26, 2004 was just such a day. State offices, including the Division of Workers Compensation, were closed for business. Thus, although the state offices were not open, it was not, by statute, due to a legal holiday. Rather, the offices were closed in order to observe a holiday or holiday season.⁸

In *City of Lawrence v. McCormick*,⁹ the Kansas Supreme Court recognized this distinction and concluded the Friday after Thanksgiving should be included within the computation for purposes of filing an appeal because it is not a *legal* holiday. In that case,

⁴ K.A.R. 51-18-2(a).

⁵ K.A.R. 51-18-2(c).

⁶ K.A.R. 51-18-2(b).

⁷ K.S.A. 35-107.

⁸ K.A.R. 1-9-2(b)(1).

⁹ *City of Lawrence v. McCormick*, 275 Kan. 509, 66 P.3d 854 (2003).

McCormick was found guilty and sentenced in five separate cases in the Lawrence Municipal Court. He filed notices of appeal on November 27, 2001, but the appeals were dismissed as they were found to be untimely. Just like here, whether those appeals were timely turned upon the Court's treatment of the Friday following Thanksgiving Day.

The *McCormick* Court concluded that although the Kansas Supreme Court, by an administrative order, followed the Governor's executive order which designated the Friday following Thanksgiving Day that year as a "holiday", that act could not transform that day into a "legal holiday" for purposes of the appeal statute. To do so would require the *McCormick* Court to "conclude that the Governor by administrative order or our court by administrative order has the power and authority to amend legislative enactments."¹⁰ Such power does not exist with either the Executive or the Judicial branch of the government."¹¹

The Board concludes this rationale governs the instant action and compels a conclusion that claimant's appeal was not timely filed. The claimant's 10 day period began on Monday, November 22, 2004 and excludes November 25, 27, 28 and December 4 and 5. Monday, December 6, 2004 was the 10th day. Claimant did not file his appeal until Tuesday, December 7, 2004, the 11th day following the effective date of the Award. Accordingly, the Board has no jurisdiction to hear this matter.

Claimant asserts that the failure to file the appeal in the timely manner is excusable neglect. The Board disagrees. There is no statutory provision within the Workers Compensation Act for excusing the timeliness of an appeal based upon excusable neglect. Moreover, even if such a concept were to be grafted into the Act, it does not appear that the failure to file an appeal in a timely fashion constitutes excusable neglect. If that were the case, then the exception would swallow the rule requiring that the task be performed in the first instance.¹² Claimant's appeal was filed one day late.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the claimant's appeals is dismissed for lack of jurisdiction.

¹⁰ K.S.A. 35-107 designates the legal holidays to be observed.

¹¹ *Id.* at 512.

¹² *Beverly California Corp. v. State*, 23 Kan. App. 2d 680, 685, 934 P.2d 992 (1997).

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director